SUPREME COURT, U. S.
FILED
MAR 31 1977

IN THE

Supreme Court of the United States

October Term, 1976
No. ....., Misc.

76-1524

THE TIMES MIRROR COMPANY,

Petitioner,

vs.

DONALD RAY ANSELMI,

Respondent.

THE TIMES MIRROR COMPANY,

Petitioner,

vs.

RAYMOND B. WHITAKER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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RAYMOND B. WHITAKER,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petitioner The Times Mirror Company, publisher of the Los Angeles Times, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in these proceedings on March 7, 1977, reversing an order of the United States District Court for the District of Wyoming dismissing the libel action below against Times Mirror by reason of lack of personal jurisdiction over that defendant.

The decision of the Court of Appeals, believed to be unprecedented, (i) asserts jurisdiction in a distant forum over a metropolitan newspaper not marketed in that forum, (ii) predicates jurisdiction upon that newspaper's exercise of its First Amendment rights to gather news in Wyoming as well as Los Angeles and to publish a story of particular interest to the local readership of the Los Angeles Times but also of potential national significance respecting crime in the Western States and (iii) contrary to the rule adopted in the Fifth Circuit, rejects First Amendment freedoms of speech and press as having any relevance to the jurisdictional issue.

Opinions Below.

The opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, appears in the Appendix hereto at page A-1. The opinion of the United States District Court for the District of Wyoming is reported at 401 F.Supp. 60 (1975), and appears in the Appendix hereto at page A-23.

Jurisdiction.

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 7, 1977. (Appendix A-29-30.) A timely petition for rehearing *in banc* was denied on March 29, 1977 (Appendix A-31), and this petition for certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1); the judgment of the Court of Appeals requiring the assertion

of Wyoming jurisdiction over Times Mirror is "fundamental to the further conduct of the case"[1] and immediate resolution of the constitutional issue at stake is essential to vindicate the rights of the petitioning publisher.[2]

Questions Presented.

1. May the State of Wyoming assert personal jurisdiction over a Los Angeles, California newspaper publisher in an action for libel brought by Wyoming residents, although

(a) the newspaper is published and predominantly circulated in the State of California,

(b) the newspaper is not purposively marketed in Wyoming, only five to eight daily copies being sent to subscribers within that jurisdiction (including reference libraries), out of a total circulation of approximately one million copies,

(c) the news article which is the subject of the litigation had a Los Angeles origin but was in part investigated by the sending of three news reporters temporarily into Wyoming, and

(d) the publisher's unrelated business activity in Wyoming was trivial and concededly insufficient itself to sustain the exercise of Wyoming jurisdiction?

2. In deciding Question 1, are protections of the First Amendment to the United States Constitution involved as well as those of the Fifth Amendment;

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[1] *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 685 (1949); *Land v. Dollar*, 330 U.S. 731, 734 (1947).

[2] See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-487 (1975).

and if so, was the court below required to consider evidence presented by the publisher Times Mirror demonstrating the chilling impact of litigation in a distant and unconnected forum upon the free exercise of the right to publish?

Constitutional Provisions, Statutes and Rules Involved.

The applicable constitutional provisions involved are the First Amendment,[3] Fifth Amendment[4] and Fourteenth Amendment[5] to the United States Constitution. The Wyoming statute which constituted the state law predicate for the assertion of jurisdiction was Section

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[3]Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[4]Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[5]Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *"

5-4.2 of Wyoming Statutes (Laws 1976, Ch. 237, § 2).[6] Times Mirror's motion to dismiss was made under Rule 12(b), Federal Rules of Civil Procedure.[7]

Statement of the Case.

On June 10, 1975, plaintiff Raymond B. Whitaker brought action in the Wyoming state court against the publisher of the Denver Post, Times Mirror as publisher of the Los Angeles Times, United Press Inter-

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[6]Section 5-4.2 of Wyoming statutes:

"Personal jurisdiction where otherwise not provided by law.

"(a) In addition to all other bases of jurisdiction otherwise authorized or provided by law, any court of this state may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's

"(i) transacting any business in this state;

"(ii) contracting to supply services or things in this state;

"(iii) causing tortious injury by an act or omission in this state;

"(iv) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct in this state or derives substantial revenue from goods consumed or services used in this state;

"(v) having an interest in, using, or possessing real property in this state; or

"(vi) contracting to insure any person, property, or risk located within this state at the time of contracting.

"(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him."

[7]Rule 12, F.R.C.P.:

"* * * *

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, ...

* * * *"

national ("UPI"), Associated Press ("AP") and a publisher of newspapers in Cheyenne complaining of various articles reporting upon an official investigation of crime in the Western States. On June 20, 1975, Donald Ray Anselmi through the same counsel filed a substantially identical complaint against the same defendants in the same Wyoming state court. Both cases were thereafter removed to the United States District Court, District of Wyoming, and proceedings in the cases were heard concurrently before United States District Judge Ewing T. Kerr.

Times Mirror moved to dismiss the proceedings as to it by reason of the lack of personal jurisdiction in Wyoming over Times Mirror. On October 2, 1975, the District Court dismissed the action against Times Mirror on the grounds that (i) the conditions of the Wyoming statute for the exercise of personal jurisdiction had not been met and (ii) applicable provisions of the First and Fifth Amendments to the United States Constitution, operative through the Fourteenth Amendment,[8] prevented the exercise of Wyoming jurisdiction under the facts of the case. (App., A-23; 401 F.Supp. 60.)

On consolidated appeals from the dismissals,[9] the Court of Appeals reversed the judgment of the District Court. (App., A-1.)

The evidence before the District Court on Times Mirror's motion to dismiss consisted exclusively of ad-

[8]See *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[9]Plaintiff Anselmi appealed from the dismissal order on the premise that it was a final decree; plaintiff Whitaker obtained permission for an interlocutory appeal pursuant to 28 U.S.C. Section 1292(b).

missions in the two complaints,[10] affidavits of Los Angeles Times Editor Thomas (App., A-32), its General Manager Nelson and its Assistant Director of Circulation Clarke, as well as answers by Times Mirror to certain interrogatories posed by the plaintiffs. No evidence was submitted by plaintiffs in opposition to the motion.

The evidence before the Court was as follows:

The News Article: On July 5, 1974, the Los Angeles Times published the complained-of article (App., A-36) reporting upon proceedings before a United States Grand Jury in Los Angeles, conducted by a Los Angeles-based federal Organized Crime Strike Force, at which plaintiff Wyoming political figures[11] Whitaker and Anselmi, among others, testified regarding allegations that they were involved in a burglary perpetrated in Riverside County, California. Anselmi and Whitaker were afforded the opportunity to make statements in their own defense, and such statements were published. Because the investigation raised questions regarding the state of law enforcement in boomtown areas of Wyoming, an extensive portion of the article was devoted to general crime problems in Rock Springs, Wyoming.

[10]In determining whether jurisdiction exists, a court is not bound by the pleadings (*McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936)), although the plaintiffs are of course bound by the allegations of their own complaint (Rule 11, F.R.C.P.).

[11]The news article identifies Mr. Anselmi as the Wyoming State Democratic Party Chairman and Democratic National Committeeman from Wyoming; Mr. Whitaker is described as a former Wyoming State Democratic Party Chairman, 1966 Democratic nominee for U.S. Senator, former Natrona County Prosecutor and counsel to the Democratic National Platform Committee in 1956.

To develop information about Rock Springs and to obtain statements from Whitaker, Anselmi and others, two Los Angeles Times reporters spent three days apiece and another reporter ten days in Wyoming as news gatherers.

Circulation of the Newspaper Containing the Article: July 5, 1974 was a weekday, consequently from five to eight copies of the Los Angeles Times were dispatched to subscribers in Wyoming, of which three were reference libraries. This volume of circulation in Wyoming was typical (with perhaps fifteen or so additional papers mailed to Wyoming on Sunday).

The Los Angeles Times is a participant in a news service; and the article in question was sent out to subscriber newspapers in the United States. However, as established by uncontradicted affidavit testimony, none of such subscribers was located in the State of Wyoming.

Finally, the story, being of potential national significance, was picked up on the wires of AP and UPI and sent to newspapers in the United States, including in the State of Wyoming. Plaintiffs Whitaker and Anselmi both alleged that the Los Angeles Times story was a copyrighted story and that "the same was republished by the [UPI and AP] . . . in violation of the copyright of the *Los Angeles Times* without the permission or license of said newspaper, and said story was therefore illegally, wrongfully, and maliciously published."[12]

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[12]The truth of this allegation was never established or rebutted. In the view of petitioner, actions of the wire services are irrelevant to the issue of jurisdiction over Times Mirror; it is inconceivable that the ambit of jurisdiction over a local newspaper is coextensive with that to which an international wire service is subject. (See *Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975).) If such were the case, a small neighborhood weekly originating a story picked up on the wire would be subject to suit anywhere in the United States.

Unrelated Business Activity of Times Mirror in Wyoming: Times Mirror is incorporated in and has its principal place of business in California. The Los Angeles Times is exclusively published, printed and first distributed in California. There is a total absence of any offices, listings, employees or assets in Wyoming. A few syndicated features are sold for approximately $2,000 to newspaper subscribers in Wyoming (e.g., the crossword puzzle) and a Times Mirror representative visits the state twice each year in connection with this activity. Some solicitations for the sale of these features are mailed to Wyoming newspapers. Sporadic mail solicitations of advertising are sent into Wyoming and other states, but an exhaustive examination of advertisements over a three-year period revealed only a few hundred dollars worth of ads per year out of the nearly two hundred million dollars of Times Mirror advertising revenues. The activity in question was trivial, sporadic and conceded by the Court of Appeals not to constitute a "systematic and continuous transaction of business." (App., A-16.)

The Chilling Impact of the Pendency of Libel Litigation in a Distant and Inconvenient Forum: Los Angeles Times Editor William F. Thomas, by uncontradicted affidavit (App., A-32), testified that: A metropolitan newspaper necessarily publishes news originating throughout the United States and the world and gathers news from the world at large. News is, to a considerable extent, engendered by controversy; and many news articles relate information concerning in-

dividuals involved in the news which they may consider to be unflattering, incorrect or both. If the publisher of the Los Angeles Times were subjected to suits in areas of the United States and the world inconvenient to its California location because it fulfills its function of reporting national and international news as well as exclusively local features, the financial and time burdens thereby imposed would severely inhibit the ability of the newspaper to perform its function.

The Los Angeles Times assumes responsibility for its contents, under the law, but it is not located in and convenient to the complete area of its news coverage and is subject to severe financial harassment if it is required to defend in foreign forums simply because it publishes news respecting individuals who may reside in any location in the United States or the world. Necessarily, any such imposition of expense and loss would constrict the ability of the Los Angeles Times (or any other newspaper) to provide to its readership the full news coverage necessary to an informed consideration of national and international events as well as the activities of the immediate community.

The District Court found the above evidence sufficient to demonstrate that plaintiffs had not met their burden[13] of establishing personal jurisdiction in Wyoming over Times Mirror, because of limitations in

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[13]*E.g., Marshall Exports, Inc. v. Phillips,* 507 F.2d 47 (4th Cir. 1974), also indicating that findings of fact by the district court relating to a jurisdictional issue are entitled to be sustained unless clearly erroneous.

the Wyoming statute[14] and the strictures of the First, Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals rejected the pertinence of First Amendment considerations;[15] and the kernel of its decision holding Times Mirror bound to defend itself in Wyoming was:

> "Unquestionably when the story was written and published it was foreseeable that it would be given substantial attention within the State of Wyoming since there was more reader interest there than in any of the other states. Thus it was no accident that it had substantial effect in Wyoming. So, then, the Times developed and prepared a story which had great reader interest, was colorful, explosive and capable of inflicting injury within Wyoming and which also was capable of producing litigation such as that which is before the court. The development of the story and the publication of it under these circumstances constituted the causing of tortious injury within the state."
>
> [App., A-20-21.]

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[14]The Wyoming statute was pertinent to these diversity proceedings removed to the federal district court because the federal court could not assume personal jurisdiction unless such jurisdiction had properly been laid in the state court. (*Freeman v. Bee Machine Co.,* 319 U.S. 448, 449 (1943).)

[15]See Opinion, App., A-19. After refusing to find applicable First Amendment rights the Court of Appeals insisted that even if such rights were "placed on the scales, so to speak," they would be outweighed by the "disadvantageous position that citizens of Wyoming would be placed in" if required to sue in another state. (App., A-19-20.)

REASONS FOR GRANTING THE WRIT.

A writ of certiorari is sought from this Court on the grounds that:

1. The constitutional question presented is of central importance to effectuation of freedoms of speech and press and has never before definitively been addressed by this Court.[16]

2. A clear conflict exists between the rules of decision on the issue of personal jurisdiction over newspaper publishers pertaining in the Courts of Appeals for the Fifth, the Tenth and perhaps the Second Circuits.

3. This Court presently has before it for decision a case presenting potentially similar issues respecting the limits of the assertion of personal jurisdiction by the courts of the states or the United States. (*Shaffer v. Heitner*, Docket Number 75-1812, argued February 22, 1977.)

I

The Assertion of Personal Jurisdiction in Wyoming Over Publisher Times Mirror Violated Its Correlative and Interlocking Rights Under the First, Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals Erroneously Rejected Applicability of First Amendment Considerations to Resolving the Issue of Personal Jurisdiction.

In cases not involving the exercise of rights of speech or press, the constitutional propriety of subjecting a person to litigation in a forum far from home is tested

[16]The point was raised in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but was not decided because the defendant newspaper had entered a general appearance and waived the issue (footnote 4 at page 264).

by the Due Process Clauses of the Fifth and Fourteenth Amendments. The litmus test of constitutionality is whether or not the defendant has such "minimum contact with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958).)

In *Hanson*, this Court made it clear that jurisdiction depends upon the performance of acts by the defendant whereby it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (*Hanson v. Denckla, supra*, 357 U.S. at 253.)[17] In the absence of such contacts, it is not "fair" to subject the nonresident defendant to jurisdiction in a distant forum, in part because of the expense and inconvenience imposed upon the defendant by virtue of such litigation. (*International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).)

In cases which do involve the exercise of rights of free speech and free press, this Court has also focused upon the burden and expense of litigation, but in the context of their "chilling" impact upon decisions to speak or not to speak, to print or not to print. The decision initially recognizing the impact of First Amendment rights upon defamation litigation noted that "would-be critics of official conduct may be deterred from voicing their criticism, even

[17]See discussion in *Fisons Limited v. United States*, 458 F.2d 1241, 1250 (7th Cir. 1972), Stevens, J., *cert. den.* 405 U.S. 1041 (1972).

though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of expense of having to do so." (*New York Times Co. v. Sullivan,* 376 U.S. 254, 279 (1964).)

Three years later, this Court affirmed that "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone.'" (*Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967).) Most recently, in part because of the financial impact upon newspapers of the publication of mandatory replies, a Florida right of reply statute failed to withstand First Amendment analysis: "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. . . . Government enforced right-of-access inescapably 'dampens the vigor and limits the variety of public debate'. . . ." (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 257 (1974).)

In view of the imperative to avoid self-censorship directly or indirectly induced by any branch of government, the procedural aspects of cases respecting speech and press necessarily must be viewed in the context of First Amendment rights.

For example, although the summary judgment remedy is deemed drastic and thus generally to be applied sparingly,[18] its prompt and efficacious use in defamation cases to weed out unmeritorious litigation at the

[18]*E.g., Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 156-161 (1970).

earliest possible stage is encouraged, for "the stake [in such cases], if harassment succeeds, is free debate. * * * Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust and less wide-open for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'" (*Washington Post Co. v. Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. den.* 385 U.S. 1011 (1967).)[19]

[19]This principle has been applied in numerous federal and state court decisions: *Time, Inc. v. Johnston,* 448 F.2d 378 (4th Cir. 1971); *Dacey v. Florida Bar, Inc.,* 427 F.2d 1292 (5th Cir. 1970); *Time, Inc. v. McLaney,* 406 F.2d 565 (5th Cir. 1969), *cert. den.* 395 U.S. 922 (1969); *United Medical Laboratories v. Columbia Broadcasting Sys.,* 404 F.2d 706 (9th Cir. 1968), *cert. den.* 394 U.S. 921 (1969); *Walker v. Pulitzer Publishing Company,* 394 F.2d 800 (8th Cir. 1968); *Thompson v. Evening Star Newspaper Company,* 394 F.2d 774 (D.C. Cir. 1968), *cert. den.* 393 U.S. 884 (1968); *Buchanan v. Associated Press,* 398 F.Supp. 1196 (D.D.C. 1975); *Carey v. Hume,* 390 F.Supp. 1026 (D.D.C. 1975), aff'd 492 F.2d 631 (D.C. Cir. 1974); *Meeropol v. Nizer,* 381 F.Supp. 29 (S.D.N.Y. 1974), aff'd 505 F.2d 232 (2d Cir. 1974), *reh. den.,* 508 F.2d 837 (2d Cir. 1975); *Cardillo v. Doubleday and Company, Inc.,* 366 F.Supp. 92 (S.D.NY. 1973), aff'd 518 F.2d 638 (2d Cir. 1975); *Kent v. Pittsburgh Press Company,* 349 F.Supp. 622 (W.D.Pa. 1972); *Hensley v. Life Magazine, Time, Inc.,* 336 F.Supp. 50 (N.D. Cal. 1971); *Cervantes v. Time, Inc.,* 330 F.Supp. 936 (E.D. Mo. 1971), aff'd 464 F.2d 986 (8th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973); *Alexander v. Lancaster,* 330 F.Supp. 341 (W.D.La. 1971); *Konigsberg v. Time, Inc.,* 312 F.Supp. 848 (S.D.N.Y. 1970); *Cerrito v. Time, Inc.,* 302 F.Supp. 1071 (N.D.Cal. 1969), aff'd 449 F.2d 306 (9th Cir. 1971); *Bon Air Hotel, Inc. v. Time, Inc.,* 295 F.Supp. 704 (S.D.Ga. 1969), aff'd 426 F.2d 858 (5th Cir. 1970); *Hurley v. Northwest Publications, Inc.,* 273 F.Supp. 967 (D.Minn. 1967), aff'd on opinion below, 398 F.2d 346 (8th Cir. 1968); *News-Journal Company v. Gal-*

(This footnote is continued on next page)

Similarly, while temporary restraining orders may in the usual case issue ex parte and without notice upon a showing of the perpetration of irreparable injury, when freedoms of speech and press are at stake their protection minimally requires a hearing on notice. (*United Farm Workers of America v. Superior Court,* 14 Cal.3d 902, 122 Cal.Rptr. 877, 537 P.2d 1237 (1975)—injunction limiting picketing.)

In short, when First Amendment rights are at issue, *any* law, rule or procedural device which chills the exercise of rights of free speech and free press is subject to strict judicial scrutiny.[20]

lagher, 233 A.2d 166 (Del. 1967); *Beatty v. Republican Herald Publishing Company,* 291 Minn. 34, 189 N.W.2d 182 (1971); *Beatty v. Ellings,* 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. den.* 398 U.S. 904 (1970), *reh. den.* 399 U.S. 917 (1970); *Twenty-Five East 40th Street Restaurant Corporation v. Forbes, Inc.,* 30 N.Y.2d 595, 331 N.Y.S.2d 29, 282 N.E. 2d 118 (1972); *Demman v. Star Broadcasting Co.,* 28 Utah 2d 50, 497 P.2d 1378 (1972); *Exner v. American Medical Association,* 12 Wash.App. 215, 529 P.2d 863 (1974); *Adams v. Frontier Broadcasting Company,* 555 P.2d 556 (Wyo. 1976), collecting the foregoing authorities at footnote 7, page 566.

[20]Justice Douglas in footnote 18 to his concurring opinion in *Columbia Broadcasting v. Democratic Comm.,* 412 U.S. 94, 168-169 (1973), assembled instances of unconstitutional burdens imposed upon the exercise of First Amendment rights: "The monetary and other burdens imposed on the press by the right of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment rights which we have struck down: (1) the requirement that a bookseller examine the contents of his shop, *Smith v. California,* 361 U.S. 147 (1959); (2) the requirement that a magazine publisher investigate his advertisers, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 492-493 (1962) (opinion of Harlan, J.); (3) the requirement that names and addresses of sponsors be printed on handbills, *Talley v. California,* 362 U.S. 60 (1960); (4) the requirement that organizations supply membership lists, *Gibson v. Florida Legislative*

The imposition of jurisdiction over a newspaper in a distant forum particularly threatens immediate and definable injury to First Amendment goals of facilitating the transmission of information to the reading public.[21] As may be derived from the Thomas affidavit (App., A-32), the expense of far-flung litigation does significantly chill the exercise of First Amendment rights by a metropolitan newspaper to the detriment of its readers (i) *in the forum state,* since discretion may impel refusing to send small numbers of copies into a state to subscribers where the economic benefit to the publisher is clearly outweighed by the risk of litigation in that forum,[22] and (ii) *in the state of publication,* since discretion may induce the avoidance of controversial news stories respecting out-of-state personages, and the gathering of news out of state, lest such activi-

Investigation Committee, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP,* 366 U.S. 293 (1961); *Bates v. City of Little Rock,* 361 U.S. 516 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); and (5) the requirement that individuals disclose organizational membership, *Shelton v. Tucker,* 364 U.S. 479 (1960). In each instance we held the restriction unconstitutional on the ground that it discouraged or chilled constitutionally protected rights of speech, press, or association."

[21]See *Martin v. City of Struthers,* 319 U.S. 141 (1943); *Lamont v. Postmaster General,* 381 U.S. 301 (1965); *Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974).

[22]"In the face of this very real risk [of jurisdiction in a foreign forum], could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of this liability? Certainly, a mere 395 issues per day as involved in the instant case would not be sufficient. As the result, those people in the State of Alabama who wish to read a publication such as the New York Times would be deprived of this opportunity." (*New York Times Company v. Connor,* 365 F.2d 567, 572 (5th Cir. 1966).)

ties lead to costly litigation far beyond the area of the newspaper's publication and operations.[23]

Under these circumstances, it is inexplicable why the Court of Appeals for the Tenth Circuit felt that the District Court's recognition of Times Mirror's First Amendment interests at the stage of determining personal jurisdiction over the publisher was premature: "Whether there is a First Amendment defense is to be determined when the case is tried and ought not as a matter of reason and logic affect the outcome of a personal jurisdiction question such as we have here." (App., A-19.) The burden and expense of litigation in a distant forum is being imposed upon Times Mirror *now;* reconsideration when the case is tried will be, quite obviously, too late.

It is particularly ironic that the Court of Appeals eschewed a First Amendment analysis in view of the fact that it focused almost exclusively upon Times Mirror's exercise of its First Amendment rights in order to find a jurisdictional nexus. The quantum of unrelated business activity of Times Mirror in Wyoming was trivial and wholly insufficient under a statutory or due process analysis to support Wyoming jurisdiction.[24]

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[23]"Thus what is being protected by the news gathering exemption is the right of subscribers within the area of immediate circulation of a newspaper or magazine to receive news of national interest which must be gathered in the District of Columbia. * * * To subject a nonresident publisher to suit in the District merely because he gathers news here for dissemination elsewhere would severely constrict the flow of national news to his local subscribers." (Footnote omitted; emphasis deleted.) *Founding Church of Scientology, etc. v. Verlag,* 536 F.2d 429, 434 (D.C. Cir. 1976); see also *Margoles v. Johns,* 483 F.2d 1212 (D.C. Cir. 1973).

[24]See discussion in *Long v. Victor Products Corporation,* 297 F.2d 577 (8th Cir. 1961), Blackmun, J.; compare *National Geographic Soc. v. Calif. Bd. of Equalization,* .... U.S. .... (1977).

The Court of Appeals recognized that "we do not here have systematic and continuous transaction of business" (App., A-16) and that "this is not a 'doing business' set of facts" (App., A-7). Times Mirror did not purposefully market its newspaper in Wyoming, and the number of copies sent into the state was insignificant. The Court of Appeals admittedly did "not judge the case only on the basis of the limited number of papers delivered to Wyoming apart from the story. If that was the extent of the evidence the result might be different." (App., A-21-22.)

No, what Times Mirror did was publish in the Los Angeles Times for the benefit of its predominately local readership a story respecting Wyoming politicians who had come to Los Angeles to testify before a Grand Jury regarding a California crime, a story which was "colorful, explosive and capable of inflicting injury within Wyoming and which also was capable of producing litigation such as that which is before the court." (App., A-21.) It had the temerity to publish other than provincial stories respecting exclusively local events and Los Angeles residents. For this it is to be subject to burdensome and expensive litigation in a distant forum, sans judicial consideration of the detrimental impact upon the freedom to publish and the freedom to read.

When the problem is analyzed with appropriate sensitivity to First Amendment rights, it is clear that Times Mirror did not and does not have the sort of purposeful contacts with Wyoming that justify the assertion of that State's jurisdiction. (See *New York Times Company v. Connor,* 365 F.2d 567 (5th Cir. 1966)—no jurisdiction in Alabama over the publisher of The

New York Times in a libel action arising out of the publication of an article criticizing one of the then City Commissioners of Birmingham, Alabama, although average daily circulation in Alabama was approximately 395 copies with a Sunday circulation of 2,455 copies, staff correspondents had visited Alabama on seven occasions, stories had been purchased from independent correspondents in Alabama, The Times employees had visited Alabama soliciting prospective advertisers, a small amount of Alabama advertising appeared in The Times, and the author of the story spent five days in Alabama gathering news for the article.)[25] Cases which do impose forum jurisdiction over a foreign publisher involve, typically, publishers of magazines or books marketed in all of the 50 states, including the forum[26]—facts entirely inapposite to those presented to the Court below.

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[25]Other cases protecting publishers from libel suits in foreign jurisdictions in situations where the publishers had at least as many contacts with the forum as did Times Mirror are: *Wolfson v. Houston Post Company,* 441 F.2d 735 (5th Cir. 1971); *Talcott v. Midnight Publishing Corporation,* 427 F.2d 1277 (5th Cir. 1970); *Walker v. Field Enterprises, Inc.,* 332 F.2d 632 (10th Cir. 1964); *Walker v. General Features Corporation,* 319 F.2d 583 (10th Cir. 1963); *Insull v. New York, World-Telegram Corporation,* 273 F.2d 166 (7th Cir. 1959), *cert. den.,* 362 U.S. 942 (1960); *Bockorny v. Midnight Publishing Corporation,* 352 F.Supp. 1093 (E.D.Wis. 1972); *Oklahoma Publishing Co. v. National Sportsmen's Club, Inc.,* 323 F.Supp. 929 (W.D.Okla. 1971); *Riverhouse Publishing Company v. Porter,* 287 F.Supp. 1 (D.R.I. 1968); and see *Margoles v. Johns,* 483 F.2d 1212 (D.C. Cir. 1973).

[26]*E.g., Johnston v. Time, Inc.,* 321 F.Supp. 837 (M.D. N.C. 1970), aff'd 448 F.2d 378 (4th Cir. 1971)—Sports Illustrated magazine; *Process Church of Final Judgment v. Sanders,* 338 F.Supp. 1396 (N.D. Ill. 1972)—nationally distributed book.

II

The Holding of the Court of Appeals for the Tenth Circuit That First Amendment Rights Are Not to Be Considered in Determining the Outcome of Jurisdictional Motions Conflicts Flatly With the Rule of Decision in the Fifth and Perhaps the Second Circuits.

Particularly in the 1960's, the Court of Appeals for the Fifth Circuit experienced litigation initiated in state courts for the possible purpose of punishing civil rights advocates critical of Southern public officials or figures.

In *New York Times Co. v. Connor,* 365 F.2d 567 (5th Cir. 1966), the Court thoughtfully noted the apparent discrepancy between its prior decision holding that the plaintiff in a defamation action had failed to establish Louisiana jurisdiction over a New York newspaper (*Buckley v. New York Times Co.,* 338 F.2d 470 (5th Cir. 1964)) and its decision which, upon the basis of comparatively ephemeral contacts, sustained Louisiana jurisdiction in a products liability case over a foreign aircraft manufacturer (*Elkhart Engineering Corp. v. Dornier Werke,* 343 F.2d 861 (5th Cir. 1965)). Upon analysis, the distinction was obvious: "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity." (*New York Times Co. v. Connor, supra,* 365 F.2d at 572.)

A First Amendment analysis has since consistently been applied to cases in the Fifth Circuit when jurisdiction is asserted over a non-forum publisher. (*Wolfson v. Houston Post Company,* 441 F.2d 735 (5th Cir. 1971); *Curtis Publishing Co. v. Golino,* 383 F.2d 586 (5th Cir. 1967), a decision affirming jurisdiction over the publisher of the Saturday Evening Post, but distinguishing a nationally marketed magazine from a newspaper (at page 590) and reaffirming that the Court had "taken into account the first amendment considerations as one factor in reaching [its] decision" (at page 592); *Edwards v. Associated Press,* 512 F.2d 258, at 266 (5th Cir. 1975): "Analysis of our own cases reveals that we have woven, in regard to entities clothed with First Amendment protections, a tighter due process net around state power than is true with regard to other entities. * * * When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed." (Fn. omitted.)[27]

The decision below makes it perfectly clear that the rule of decision in the Tenth Circuit is flatly to the contrary. Consideration of First Amendment rights at the jurisdictional stage is deemed premature; the only time at which First Amendment considerations will be dealt with by the court in the Tenth Circuit is upon trial of the merits. It is submitted that it is grossly inappropriate that newspapers sued within the Fifth Circuit are entitled to full constitutional protections at the outset while those sued in the Tenth

[27]The Court of Appeals for the Tenth Circuit is simply mistaken in its impression that "the Fifth Circuit is not at this time adhering to the early rule calling for weighing heavily the fact that the case is a First Amendment one in deciding whether the contacts are adequate." (App., A-19.)

Circuit must hold their First Amendment rights in abeyance until trial.

It is perhaps of interest that the position of the Court of Appeals for the Second Circuit is unclear as a consequence of the opinion in *Buckley v. New York Post Corporation,* 373 F.2d 175 (2nd Cir. 1967). In affirming jurisdiction in a Connecticut forum over a New York newspaper, Judges Friendly and Smith thought First Amendment considerations might more appropriately be considered in connection with *forum non conveniens* motions (at 183-184); Judge Medina thought it equally appropriate to consider First Amendment factors in connection with jurisdictional adjudication (at 184-185); but the point was agreed to be immaterial to the decision in view of the facts that the newspaper was located only 40 miles from the forum court, it had a substantial circulation in Connecticut, it sought to sell newspapers to Connecticut commuters, and New York City and its Connecticut suburbs were deemed "economically and intellectually one." (At 184.)

Conclusion.

Petitioner Times Mirror urges this high Court to consider a constitutional issue, never before definitively adjudicated, of pivotal significance to the exercise of free speech and press freedoms in this country. The undeniable conflict which now exists between the personal jurisdictional standards as applied to newspaper publishers in the Fifth, the Tenth and perhaps the Second Circuits requires resolution lest the First Amendment rights of such publishers be unequally construed and protected.

The problem created by the Tenth Circuit's opinion is not an isolated one. Its chilling impact stands sure to bedevil any newspaper publisher printing news stories involving national personages and events. In view of the conflict in the Circuits and the constitutional issues deferred from the time they were previously presented in 1964, petitioner respectfully submits that this Court should accept certiorari and give guidance to the inferior courts as well as those vitally affected by the holding in the court below.

Dated: April 27, 1975.

Respectfully submitted,

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APPENDIX.

United States Court of Appeals, Tenth Circuit.

Nos. 75-1998, 75-1999 and 76-1099.

Donald Ray Anselmi, Plaintiff-Appellant, v. The Denver Post, Inc., a Colorado corporation; The Times Mirror Company, a California corporation; Cheyenne Newspapers, Inc., a Wyoming corporation; United Press International, a New York corporation; Associated Press, a New York corporation, Defendants-Appellees. Raymond B. Whitaker, Plaintiff-Appellant, v. The Denver Post, Inc., a Colorado corporation; The Times Mirror Company, a California corporation; Cheyenne Newspapers, Inc., a Wyoming corporation; United Press International, a New York corporation; Associated Press, a New York corporation, Defendants-Appellees. Appeal from the United States District Court for the District of Wyoming (D.C. Nos. C75-133 and C75-127).

Filed: March 7, 1977.

Edward P. Moriarity, Casper, Wyoming (G. L. Spence, Casper, Wyoming, on the brief), for Plaintiff-Appellant Anselmi.

F. M. Andrews, Jr., Riverton, Wyoming, for Plaintiff-Appellant Whitaker.

Robert S. Warren of Gibson, Dunn & Crutcher, Los Angeles, California (Paul B. Godfrey of Godfrey & Sundahl, Cheyenne, Wyoming, and Richard P. Levy of Gibson, Dunn & Crutcher, Los Angeles, California, on the brief), for Defendant-Appellee The Times Mirror Company.

Before SETH, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

In this appeal from a dismissal of a defamation action, the issues presented to us are threshold ones: (1) whether the Wyoming Long-Arm Statute applies, and (2) the presence or absence of sufficient contacts in Wyoming of The Times Mirror Corporation, a California corporation, to constitute a basis for the exercise of personal jurisdiction over it by the United States District Court for the District of Wyoming. The trial court, Judge Kerr, dismissed the action against The Times Mirror Corporation for want of personal jurisdiction. We reverse.

The article which is here claimed to be defamatory appeared in The Los Angeles Times newspaper on July 5, 1974. It concerned alleged criminal activities in Wyoming and especially in the City of Rock Springs. It was entitled "U. S. Tries to Close Up 'Wide Open' Wyoming." The plaintiffs Donald Ray Anselmi and Raymond B. Whitaker were expressly named in the article which said that they had testified before a grand jury in Los Angeles and were asked if they had bought guns in Wyoming which they knew had been stolen in California. The Times article commented that even if the gun running was provable, the incidents hardly appeared to be high crimes. However, it added that members of the Federal Crime Strike Force are attempting to determine "* * * * if the three politicians are involved in more serious matters." The alleged libelous article discussed many types of organized crime in Rock Springs including murders for hire, jewel and fur thievery and other high crimes. Plaintiffs allege that the innuendos in the article imply that they were heavily involved in these high crimes. The further allegations are that the articles were untrue and were printed with malicious intent, or in the alternative, with a reckless disregard for its truth.

Further allegations are to the effect that contemporaneously with the publication of the July 5, 1974 story in the Los Angeles Times, defendant through the Los Angeles Times news service, a wholly-owned business, caused a story to be released for publication by subscriber newspapers throughout the United States. The defendant vehemently denies this statement and in its brief argues that it has no news service subscribers in Wyoming and that any publication of the articles there took place in violation of the copyright of the Los Angeles Times and without its permission.

The Times Mirror is, as we have noted, a California corporation having its principal place of business in California. It publishes the Los Angeles Times which is first distributed there. It does not, of course, have any offices, listings, employees or assets in Wyoming, but some syndicated features are sold to newspapers subscribers in Wyoming. This amounts to about $2000. Also, a Times Mirror representative visits the state twice a year. Also, some direct mail solicitations are sent to Wyoming newspapers and there are mail solicitations of advertising sent into Wyoming and other states.

The plaintiff, Anselmi, lives in Rock Springs, Wyoming, and is engaged in business there. The plaintiff, Whitaker, is an attorney who resides in and practices law in Casper. He also has some business in Rock Springs.

The Los Angeles Times had, previous to the publication in question, sent three reporters to investigate and to gather news in Rock Springs and other Wyoming towns. Two of them spent three days each and the other spent approximately ten days in Wyoming. All of this activity was to gather news for the story in controversy. The one who was there more than a

week spent about $1,000. The other two spent $665. The story giving rise to the lawsuit carried a Rock Springs, Wyoming dateline.

The complaints of both Anselmi and Whitaker allege that the Los Angeles Times exchanged information with The Denver Post and vice versa. The Los Angeles Times and The Denver Post are alleged to have worked together in the development of the Rock Springs crime story which is the basis of this lawsuit. The first story was published in The Denver Post on June 23, 1974, and thereafter it was made available to the news services to which the Post subscribed, including United Press International (UPI) and the Associated Press and was circulated through those wire services in Wyoming and, of course, throughout the country.

During this time of initial publication, the Times Mirror through the Los Angeles Times continued the development of its own story and thereafter published an expanded and more detailed version of it on July 5, 1974. It is alleged that this story was made available for further distribution and republication through the Times to its news services, the UPI and the Associated Press. These stories appeared in a number of Wyoming newspapers and in other newspapers across the nation. Further allegations tell about additional publications following the release of the Los Angeles Times story.

The district court's dismissal which was entered on the second day of October relied on Insull v. New York, World-Telegram Corporation, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960) for its holding that because the single publication rule applied, the tortious act occurred not in Illinois where there was distribution of the paper and where the

complaint was filed, but in New York where the paper was first published. Judge Kerr applied the reasoning of the *Insull* case to the fact situation at bar saying that the Wyoming Long-Arm Statute did not apply as a basis for jurisdiction. Wyo. Stat. Section 5-4.2 (iii) and (iv). The trial court held that part (iii) was inapplicable because the act was complete in California and not in Wyoming and subsection (iv) was ruled out by reason of the lack of evidence of doing a volume of business in Wyoming.

The contentions of the plaintiffs are that the trial court erred in the following respects:

First, in its holding that it was without jurisdiction under Wyoming Statutes, Section 5-4.2(a)(iii).

Second, that the court erred in determining that jurisdiction could not be exercised over the Times Mirror Company since it did not carry on a regular course of business in Wyoming.

Third, that the court erred in refusing to defer a ruling on the defendant's motion to dismiss, which request was made by the plaintiff for the reason that jurisdictional discovery was then in progress and it was not completed. The court lacked sufficient facts to rule.

I.

WHETHER JURISDICTION EXISTS UNDER THE WYOMING LONG-ARM STATUTES, SECTIONS 5-4.2(a)(iii) and (iv)

The relevant provisions of the Wyoming Long-Arm Statute which were considered by the court are subsections (iii) and (iv). They provide:

> Section 5-4.2. *Same—Personal jurisdiction where otherwise not provided by law.*—(a) In

addition to all other bases of jurisdiction otherwise authorized or provided by law, any court of this state may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's

* * *

(iii) causing tortious injury by an act or omission in this state;

(iv) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct in this state or derives substantial revenue from goods consumed or services used in this state.

In reliance on *Insull, supra,*[1] Judge Kerr reasoned that the single publication rule applied in Wyoming and that the *Insull* case was germane; that the defamation under the rule was capable of having but a single publication and that occurred in California, not in

[1]*Insull, supra,* at page 171, expressed the view that there could not be a tort committed by the New York World-Telegram in Illinois by sending the defamation into the state. It said:

> Upon the same facts which we have found inadequate to prove defendants transacted any business within Illinois, plaintiff now asks us to hold that all of the defendants committed a tortious act there. None of the defendants either personally or through an agent was present in Illinois. Cf. Nelson v. Miller, 11 Ill.2d 378, 393, 143 N.E.2d 673, 681.

The court rejected the proposition that there could be injuries and claims at the place where the plaintiff resides. On this it said:

> Plaintiff argues that "each publication of the Lucey article is a separate tort and the subject of a separate cause of action" and also that "it is well settled that the place of wrong, or the place where the last event necessary to make the defendant liable in tort occurs, is 'where the defamatory statement is communicated', and not the place 'from which the offending material is sent or where it originates'." He adds that the "several torts were nonetheless committed when the newspapers were received in Illinois after having been mailed by the defendants."
>
> In substance, plaintiff argues that the appearance of defendants' papers in Illinois is the "last event necessary to make the defendant liable in tort." That this is a mistaken conclusion is established by Illinois law.

273 F.2d at 171. The court further elucidated that in cases of multi-state circulation the cause of action for libel is absolutely complete at the time of first publication and subsequent appearances or distributions are of no consequence but are only relevant in computing damages. The court concluded that there was no tort committed in Illinois and dismissed on that basis.

Wyoming; that by reason of California's exclusive jurisdiction Wyoming was precluded from entertaining the case. Thus subsection (iii), *supra,* which calls for a tort being committed in Wyoming was by its terms inapplicable since the final act occurred in California.

As to subsection (iv), which calls for regular soliciting of business or engaging in a persistent course of conduct or deriving substantial revenue from goods consumed or services rendered, it was ruled out for lack of the necessary volume of business in Wyoming.

We agree with the trial court's ruling as to the non-applicability of subsection (iv), for this is not a "doing business" set of facts. We must, however, disagree with the trial court's holding that subsection (iii) does not apply because of the single publication rule. In our view that section, which simply demands causing tortious injury in Wyoming, governs. Where, as here, it is alleged that a defamatory statement has been sent into Wyoming and causes injury to a Wyoming resident, subsection (iii) is at least potentially applicable depending on the other facts. It is also

our view that the single publication rule has nothing to do with the concept of personal jurisdiction such as is presented here. Efforts to link it exclusively to a particular forum court is a distortion. The rule is designed to prevent multiple suits and unending judgments growing out of the same act of defamation.

A Wyoming case furnishes a clear analogy in support of the position which we have taken, namely, that a tort is not only complete at the place where the allegedly libelous material was published, but rather can have effects where the plaintiffs who are allegedly libeled reside. We refer to the decision of the Supreme Court of Wyoming in State of Wyoming v. Levland, 37 Wyo. 372, 262 P. 24 (1927). This was a criminal defamation action wherein the issue was in which county within Wyoming venue would lie where the libel was published in one county but was published and distributed in another county where the libelee resided. The ruling was that venue would lie in the county of plaintiff's residence and was not limited to the county where the libel was first printed. The Wyoming Court observed:

> . . . . to hold that the place of printing and issuing the paper is the only place where such prosecution can take place might also lead to great abuse, and would, for instance, enable a newspaper, printed outside of the state but circulated within it, to villify citizens of this state without restraint, leaving the latter virtually helpless victims in the hands of the unscrupulous, even though the authors of a libel should live in this state or could be reached within it subsequent to the publication . . . .

Id. at 28. And *cf.* Spriggs v. Associated Press, et al., 55 F. Supp. 385 (D.Wyo. 1944), which also recognizes multiple publications of defamatory material.

The *Levland* holding thus points the way to the view which the Wyoming Supreme Court would probably adopt. A more important result is its recognition that there can be injuries beyond the place where the libel first came to the surface through a publication of the newspaper. It recognizes that one can be libeled at the place where he resides and where his reputation resides. Since, however, the trial court went beyond holding that Wyoming would probably follow the single publication rule and ruled in addition that the single publication rule controls personal jurisdiction, we cannot stop here but must take up the question whether the single publication rule carries all of the consequences which have been attributed to it.

II.

IS THE SINGLE EFFECTIVE PUBLICATION THAT WHICH TAKES PLACE WHERE A NEWSPAPER IS PRINTED AND CIRCULATED, AND IS THE COURT OF THE PLAINTIFF'S DOMICILE THUS PRECLUDED FROM EXERCISING JURISDICTION?

The Second Circuit in a definitive case, Buckley v. New York Post Corporation, 373 F.2d 175 (2d Cir. 1967), rejects the entire notion that the single publication rule precludes the exercise of jurisdiction by all of the courts except that in the place where the paper is published and distributed. Buckley, a resident of Connecticut, had instituted a libel action in state court there against the New York Post, a Delaware corporation which had its principal place of busi-

ness in New York City. The Post removed it to the United States District Court for the District of Connecticut. Buckley contended there that the Post was subject to personal jurisdiction under subsections (iii) and (iv) of the Connecticut Long-Arm Statute.

Subsection (iii), unlike the Wyoming subsection (iii), was plainly designed to cover products liability. Subsection (iv) of the Act was like the Wyoming subsection (iii) and was not so limited. It extended broadly to tortious injury committed within the state. It was contended there, as it is here, that the single publication rule would likely be adopted by the State of Connecticut and the Second Circuit did not disagree with this. The important thing is that the court ruled that this did not prevent a suit from being brought in Connecticut and did not deprive the Connecticut court of jurisdiction.

The court, speaking through Judge Friendly, pointed out that the single publication rule had nothing to do with the place of filing the lawsuit.[2] The Friendly

[2]Judge Friendly's opinion said:

> To hold that the single-publication rule exempts a publisher of a newspaper or magazine or a broadcaster from a long-arm statute that would otherwise have been applicable would be quite as artificial as the "last event" approach of the first Conflicts Restatement and the separate publication concept of Duke of Brunswick v. Harmer, 14 Q.B. 185, 117 Eng. Rep. 75 (1849), which the new rule was intended to overcome. Elliptical statements that a libel by newspaper is "complete" upon publication, though often accurate enough in their particular context, should not obscure that the purpose of the single publication rule is not to deprive a plaintiff defamed in another state of a privilege to sue there which the legislature had granted generally to persons injured by wrongful conduct within its borders, but rather to protect the defendant—and the courts—from a multiplicity of suits, an almost endless tolling of the statute of limitations, and diversity in applicable substantive law. See 1 Harper & James, Torts Section 5.16 (1956); Prosser, Torts 788-89 (1964). These

opinion properly noted that this misconception was based on the old "last event" rule enunciated in the first Conflicts Restatement and the old English case of Duke of Brunswick v. Harmer, *supra*. The Judge then went on to say that the single publication rule existed for the purpose of preventing multiplicity of suits and almost endless tolling of statute of limitations. The court said that these goals can be satisfied by holding that an injured plaintiff can collect his damages in one action, and so then held that there was no relationship to the exercise of personal jurisdiction over a claim arising at the place of the plaintiff's residence. The court went on to reject the doctrine on the ground that it was mechanical.[3] The rule in

> goals can be sufficiently accomplished by holding that the plaintiff must collect all his damages in one action, that the statute of limitations begins to run on the initial publication, and that substantive issues will be governed by a single law—deciding just which is a harder nut to crack, see Restatement (Second) Conflict of Laws Section 379e (Tent. Draft No. 9, 1964).

373 F.2d at 179-80.

[3]The court added:

> To be sure, if only the interests of the defendant were to be considered, these objectives could be more certainly accomplished by minimizing the possibilities of suit at a place other than that of initial publication, since that forum presumably would apply its own statute of limitations and, *non constat* Restatement Second Section 379e, might have a bias in favor of its own substantive law. *But defamed persons have rights too;* the interests of the defendant are not so dominant as to require a mechanical application of the single publication rule in such a manner that circulating a libel outside that state should be treated as if it never occurred. Moreover, as a matter of precedent, this court's holding in Mattox v. News Syndicate Co., 176 F.2d 897, 904, 12 A.L.R.2d 988 (2 Cir.), cert. denied, 338 U.S. 858, 70 S.Ct. 100, 94 L.Ed. 525 (1949), that the single publication rule did not make the tort so "complete" at the place of publication as to preclude application of the substantive law of plaintiff's domicile, argues strongly against defendant's claim.

373 F.2d at 180 (emphasis added.)

the *Insull* case, it was pointed out, protected only the defendant and did not recognize the plaintiff's rights.

The *Buckley* opinion calls attention to the illogic of reading a statute like subdivision (iv) of the Connecticut Act (causing a tort within the state) so as not to permit a suit in the state of the plaintiff's residence, especially where the plaintiff lives some distance from the place of location of the newspaper requiring as it does the plaintiffs to travel to a distant place and to enshrine as the only forum a state far removed from the evidence and where the witnesses are unfamiliar with the reputation which has allegedly been injured. Finally, it was said that the *Insull* decision was difficult to reconcile with the long-arm statute since the essence of the defamation is injury to the reputation of plaintiff in his home area where he is known.

The Restatement of Conflict of Laws (Second), Section 150, has corrected the mistake that was made following the "last event" doctrine. Section 150 declares that rights and liabilities from defamatory material are determined by the local law of the state which has the most significant relationship to the occurrence, and subsection (2) declares that a significant relationship will be the state where the party was domiciled at the time that the matter complained of was published in that state.

Comment (e) of this section provides that when there has been a publication in two or more states of an aggregate publication claimed to be defamatory, at least most issues involving the tort should be determined by the local law of the state where the plaintiff has suffered the greatest injury by reason of his loss

of reputation and that this will usually be the state of the plaintiff's domicile.

These expressions are entirely in accord with the ruling of the Second Circuit in *Buckley*. They make it clear that the publication is not so complete at the place of first publication as to not allow an action elsewhere in a situation such as this where the plaintiff is unknown at the place of first publication and has a reputation only in his home state.

Prosser on Torts expresses the same viewpoint as does Harper and James, that a need existed at the time of their being written for a true single publication rule—one which prevents multiple lawsuits based on the same defamatory statement by the same plaintiff. Prosser, Law of Torts, Section 113 (4th ed. 1971), 1 Harper and James, Section 5.16 (1956). Recent cases which have adopted the modern view and rejected the *Insull* approach include one from Illinois which calls attention to the change in the Illinois law. This is the case of Process Church of Final Judgment v. Sanders, 338 F. Supp. 1396 (N.D. Ill. 1972). The court, through Judge Hubert Will, had to determine whether the *Insull* decision continued to represent the law in Illinois. The determination was that it did not. In the course of its ruling the court noted that the *Insull* case was contrary to the decision of the Illinois Supreme Court in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961) as to torts committed in the state as a result of a force originating elsewhere. *Gray*, it was noted, a landmark decision on torts committed within the state, overturned the *Insull* holding as to torts committed within the state.

In 1959, the Illinois Legislature passed the Uniform Single Publication Act which provided that no person could have more than one cause of action for damages for libel or slander or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine, etc. It further said that any recovery in any action included all damages for any such tort suffered by the plaintiff in any jurisdiction.

The Act does not mention jurisdiction nor does it include any limitation on the forum selection. On this Judge Will said:

> The Uniform Act clearly was not intended as a limitation upon a state's jurisdiction including its long arm jurisdiction. Indeed, the purpose behind any single publication rule is to protect both the courts and the defendant publishers from a multiplicity of suits, disparity in applicable substantive law, and a seemingly endless tolling of the statute of limitations. *See*, Prosser, Torts, 788-9 (1964); 1 Harper & James, Torts Section 5.16 (1956). To read a limitation upon the exercise of a state's jurisdiction into the Uniform Act, as Dutton would, is totally unsupportable given the clear language of the Uniform Act and its stated purpose.

338 F. Supp. at 1400.

The court's final observation was that the "demise" of the *Insull* decision avoided the anomalies that its continuing application would have engendered; that the blind application of it has run counter to accepted concepts of rational jurisprudence.

Insull, the court concluded, would have required dismissal of the case before the court and would have sent the plaintiff on a journey to New York in quest of a forum, taking all of his witnesses with him. The court added:

> Since libel is a damage to one's reputation and can be caused only in those jurisdictions where a reputation exists, *Insull* not only would necessitate travel and expense for an injured plaintiff but also would make proof of damages difficult, if not impossible, in a jurisdiction where the plaintiff was unknown.

338 F. Supp. at 1400.

III.

ARE THERE PRESENT THE MINIMUM CONTACTS WHICH THE CONSTITUTION REQUIRES IN ORDER TO SUBJECT THE ALLEGED TORT-FEASOR OR CONTRACTING PARTY TO AMENABILITY TO SUIT WITHIN THE STATE OF WYOMING?

We hold that the minimum contacts are present. In answering the above question we consider first the decision of the Supreme Court in International Shoe Company v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 158 (1945). There the State of Washington was seeking to exact and collect taxes from the shoe company. These were unemployment compensation costs, a specified percentage of the wages paid by each employer for wages earned by employees in the state. In upholding the jurisdiction of the state to levy the taxes in question it was pointed out that the shoe company employed a number of salesmen

within the state and that they were present systematically and continuously through a period of years and this resulted in a large volume of interstate business. The Supreme Court said:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and so far as those obligations *arise out of or are connected with* the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Supra, 66 S.Ct. at 160 (emphasis added.)

If jurisdiction of the defendant is obtainable only by presenting facts equal to those which were present in *International Shoe,* the present case would not be one in which jurisdiction could be obtained over the defendant because we do not here have systematic and continuous transaction of business. Such is not necessary. The opinion in *International Shoe* acknowledged that some single or occasional acts of the corporate agent could be sufficient contact depending on the nature and quality of the acts performed. The Court said that the criteria which make the difference between activities which justify the subjection of a corporation to a suit and those that do not "cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less." *Id,* at 159. Satisfying due process

depends on the quality and nature of the activity in relation to the fair and orderly administration of the laws which it is the purpose of the due process clause to insure.

In McGee v. International Life Ins. Co., 335 U.S. 220, 78 S.Ct. 199 (1957), the Court upheld jurisdiction in California over a Texas insurance company whose only contacts amounted to the soliciting of *an* insurance policy in California, the sending of premium notices and the collection of premiums. A California statute subjected an insurance company doing business within the state with its residents to the jurisdiction of the California courts. It rendered such insurance companies amenable to suits in California. The Court said that a California court could entertain the suit and enter judgment against the International Life Insurance Company if the contract was delivered in California, premiums were mailed from there and the insured was a resident of that state when he died. The Court said:

> These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company's defense of suicide—will be found in the insured's locality.

Id. at 223. State residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally

accountable. The case is significant because of its holding that due process can be satisfied even though the contact with the state is limited to one business transaction, namely, the sale and servicing of an insurance policy, and the litigation having its source in that insurance contract.

The case of Hanson v. Denckla, 357 U.S. 1235, 78 S.Ct. 1283 (1958), has value for comparison purposes. The controversy there was the relative rights to the corpus of a trust which had been established in Delaware by a settlor who later took up residence in Florida. There was litigation in Florida concerning this trust in which the Florida court held that the trust was invalid. Subsequent litigation took place in Delaware, the Supreme Court of which held that the Florida Supreme Court decision lacked binding force. The Supreme Court of the United States determined the conflict by holding that the Florida court lacked personal jurisdiction to render its decision with respect to the validity of the trust because the trustee was the party in interest and he had no relationship to Florida whatsoever. The Court through Chief Justice Warren said:

> . . . What "minimum contacts with a state will render such a publisher amenable to service of process is dependent to a large degree upon the equities of the situation. The ultimate goal is that justice prevail, and the courts' concept of what constitutes minimum contacts will be molded to meet the needs of justice. (Footnote omitted). (*sic*).

Id. at 1240. Here again the court was faced with a single specific property relationship. Significantly this fact was not responsible for denial of jurisdiction. Rather, it was the fact that the party in interest who could bring the trust under the jurisdiction of Florida courts was absent. The trust's lack of relationship to Florida turned the decision. The settlor's relationship to the trust was insignificant and thus incapable of activating Florida laws.

The Fifth Circuit in earlier cases has ruled that in a newspaper case somewhat more substantial contacts are needed than in other types of cases. Such a view is expounded in New York Times Company v. Connor, 365 F.2d 567, 572 (1966). In Buckley v. New York Post Corporation, 373 F.2d 175 (2d Cir. 1967), the contrary view is adopted. There the contact is measured within the guidelines of the Supreme Court decisions without regard to the fact that the cause when considered on its merits has First Amendment protections. Whether there is a First Amendment defense is to be determined when the case is tried and ought not as a matter of reason and logic affect the outcome of a personal jurisdiction question such as we have here.

Later Fifth Circuit cases such as Curtis Publishing Company v. Golino, 383 F.2d 586, 588, 589 (5th Cir. 1967), suggest that the Fifth Circuit is not at this time adhering to the early rule calling for weighing heavily the fact that the case is a First Amendment one in deciding whether the contacts are adequate. To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process. But even if this element were to be placed on the scales, so to speak, at this time, there is a

countervailing policy consideration that outweighs it. We refer to the extremely disadvantageous position that citizens of Wyoming would be placed in if we were to adopt the *Insull* approach. No matter what the extent of the defamation was by an out-of-state member of the media to a citizen of Wyoming, the latter would be remedyless [*sic*] within Wyoming and would be forced, as we have seen, to travel to the home of the newspaper in order to vindicate his reputation.

The *International Shoe* case teaches that the contacts must not be so insignificant as to violate traditional notions of fair play and substantial justice. It cannot be said that in the case at bar the contacts are, in the light of this standard, inadequate since the Los Angeles Times is shown to have had business contacts in Wyoming consisting of the sale of syndicated features to newspaper subscribers. It has, in addition, mailed solicitations to Wyoming newspapers and has solicited advertising in Wyoming. Its subscribers are minimal, five to eight copies of the newspaper were dispatched to subscribers in Wyoming of which three were sent to reference libraries, plus 23 copies of the newspaper were mailed to Wyoming on Sundays. On the other hand, this story was a special event. Three reporters were dispatched to Wyoming for the purpose of investigating and writing it. The story carried a Rock Springs, Wyoming dateline.

Unquestionably when the story was written and published it was foreseeable that it would be given substantial attention within the State of Wyoming since there was more reader interest there than in any of the other states. Thus it was no accident that it had substantial effect in Wyoming. So, then, the Times developed and prepared a story which had great reader

interest, was colorful, explosive and capable of inflicting injury within Wyoming and which also was capable of producing litigation such as that which is before the court. The development of the story and the publication of it under these circumstances constituted the causing of tortious injury within the state.

It is interesting to note that the Fifth Circuit has recognized that the single publication rule did not have to affect jurisdictional statutes. *See* Edwards v. Associated Press, 512 F.2d 258, 264-65, n.19. *See also* Mattox v. News Syndicate Co., 176 F.2d 897, 905 (2d Cir. 1949). *Cf.* Dominiak v. National Enquirer, 439 Pa. 222, 266 A.2d 626, 42 ALR3d 798 (1970), which explains the single publication rule at page 627.

Frequently the limited application of the single publication rule in *Insull* has caused state courts to adopt the multiple publication rule. *See* Lewis v. Reader's Digest Association, Inc., 162 Md. 364, 512 P.2d 702 (1973).

We are convinced that the so-called single publication rule does not and should not have the consequences which have been attributed to it by the *Insull* case.

Finally, it is our opinion that the single publication rule has not been adopted in Wyoming and is unlikely to be adopted. We are also of the opinion that even if it were law it would not result in precluding Wyoming citizens who are defamed by use of state publications from obtaining jurisdiction in Wyoming.

The admitted facts bring the case within subsection (iii) of the Wyoming Long-Arm Statutes. As a result we do not judge the case only on the basis of the limited number of papers delivered to Wyoming apart

from the story. If that was the extent of the evidence the result might be different. Nor does the fact that a single transaction is the dominant factor detract from the conclusion that jurisdiction exists considering the quality and nature of the activity. Viewing the transaction as a whole, then, we conclude that the Los Angeles Times released a force which took effect in Wyoming and which with the other jurisdictional facts satisfies the minimum contact requirement.

* * *

The third point advanced by appellants is the error of the court in refusing to defer a ruling on the defendant's motion to dismiss, which request was made by the pl tiffs in order to complete discovery relative to jurisdiction. The third point need not be taken up.

Accordingly, the judgment of the district court in dismissing as to Los Angeles Times Mirror is reversed. The cause is remanded with directions to the district court to reinstate this claim.

Memorandum Opinion.

In the United States District Court, for the District of Wyoming.

Raymond B. Whitaker, Plaintiff, vs. The Denver Post, Inc., a Colorado corporation; The Times Mirror Company, a California corporation; Cheyenne Newspapers, Inc., a Wyoming corporation; United Press International, a New York corporation; Associated Press, a New York corporation, Defendants. No. C75-127.

Donald Ray Anselmi, Plaintiff, vs. The Denver Post, Inc., a Colorado corporation; The Times Mirror Company, a California corporation; Cheyenne Newspapers, Inc., a Wyoming corporation; United Press International, a New York corporation; Associated Press, a New York corporation, Defendants. No. C75-133.

Filed: Oct. 2, 1975.

Edward P. Moriarity of the firm of Spence & Moriarity, Casper, Wyoming, appearing as counsel for plaintiff.

Paul B. Godfrey of the firm of Godfrey & Sundahl, Cheyenne, Wyoming, and Robert S. Warren of the firm of Gibson, Dunn & Crutcher, Los Angeles, California, appearing as counsel for defendant Times Mirror.

KERR, District Judge.

Decided October 2, 1975.

Plaintiffs (Whitaker and Anselmi) have filed separate and independent libel actions in the state court. These cases were removed to this court under the provisions of 28 U.S.C. § 1441(c). Times Mirror, a California

corporation, filed a motion for dismissal in each of the cases for lack of in personam jurisdiction in Wyoming.

The issue for decision in these cases is whether Times Mirror is qualified to do business in the State of Wyoming to bring it within the Wyoming Long-Arm Statute.

Times Mirror has no offices, place of business, assets, officers or agents in Wyoming. The Los Angeles Times is a division of the Times Mirror Company. It was in this paper that the alleged libel appeared. The paper is printed in California and has an approximate circulation in that state of one million. During the years 1971 to 1975, a maximum of 16 copies of the daily editions and 26 copies of the Sunday edition have been mailed to Wyoming subscribers. During the past three and one half years the Times Mirror has occasionally solicited advertising in Wyoming (one visit was made for this purpose by an agent of the defendant; the rest of the solicitations were by mail). Five reporters were sent into the state, three of whom were researching the allegedly defamatory articles, and one salesman was sent into this state to solicit subscriptions by Wyoming newspapers to certain syndicated features.

Personal jurisdiction over an out-of-state corporation is available under Wyoming's Long-Arm Statute, Wyo. Stat. § 5-4.2:

> § 5-4.2. Personal jurisdiction where otherwise not provided by law.—
>
> (a) In addition to all other bases of jurisdiction otherwise authorized or provided by law, any court of this state may exercise personal jurisdiction over a person, who acts directly or by

> an agent, as to a claim for relief arising from the person's
>
> (i) transacting any business in this state;
>
> (ii) contracting to supply services or things in this state;
>
> (iii) causing tortious injury by an act or omission in this state;
>
> (iv) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct in this state or derives substantial revenue from goods consumed or services used in this state:
>
> (v) having an interest in, using, or possessing real property in this state; or
>
> (vi) contracting to insure any person, property, or risk located within this state at the time of contracting.
>
> (b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

Only subsections (iii) and (iv) are claimed as jurisdictional bases in this case.

The Seventh Circuit has held in Insull v. New York World-Telegram Corp., 273 F.2d 166 (7th Cir. 1959), cert. denied, 362 U.S. 942 (1960), that local distribution of allegedly libelous material originally published in another state was an inadequate basis for obtaining jurisdiction. The tortious act was committed at the place of publication—not in Illinois where several

copies of the paper were distributed. The single publication rule was used to reach the conclusion. Thus, Wyo. Stat. § 5-4.2(iii) is not a basis for jurisdiction since the "act" was committed in California, not in Wyoming. The Second Circuit has placed restrictions upon the use of this rule. In Buckley v. New York Post Corporation, 373 F.2d 175 (2nd Cir. 1967), the court held that the single publication rule should not be used to escape jurisdiction where "relevant connections" between the publisher and the forum state exist. In this case the large volume of intentionally sought business in Connecticut was considered sufficient basis for jurisdiction. Jurisdiction under Wyo. Stat. § 5-4.2(iv) therefore is not barred by the single publication rule and the Court must determine whether defendant Times Mirror "regularly does or solicits business or engages in any other persistent course of conduct in this state or derives substantial revenue from goods consumed or services used in this state."

The Supreme Court held in International Shoe Co. v. Washington, 326 U.S. 310 (1945) that the existence of "minimum contacts" between the defendant and the forum justified the exercise of jurisdiction with regard to actions arising from the defendant's activity in the forum. Since that time state and lower federal courts have repeatedly been called upon to apply the minimum contact standard in libel suits involving nonresident publishers. In general, the courts have refused to find jurisdiction.

When applying the "doing business" provision of long arm statutes to publishers the courts have required more substantial contact than when justifying the exercise of jurisdiction over other nonresidents because of the "First Amendment considerations surrounding

the laws of libel," New York Times Co. v. Conner [*sic*], 365 F.2d 567, 572 (5th Cir. 1966). Circulation of a small number of copies of a newspaper or magazine within the forum state has usually been held insufficient even when accompanied by occasional solicitation for advertising or visits by reporters. See Buckley v. New York Times Co., 338 F.2d 470 (5th Cir. 1964), where limited reporting and advertising activities plus the sale of 391 daily copies and 1784 Sunday copies was held insufficient. See New York Times Co. v. Conner [*sic*], supra, where circulation of 395 daily and 2455 Sunday editions and limited reporting and advertising contacts in the state were held insufficient. In Walker v. Field Enterprises, Inc., 332 F.2d 632 (10th Cir. 1964), the court held jurisdiction was lacking in Oklahoma over the newspapers which prepared the allegedly defamatory article even though the paper circulated 26 copies of its daily edition in the state, syndicated its features to nine Oklahoma papers, sent an agent into the state twice a year to promote sales and solicit advertising, and occasionally assigned reporters to cover news stories in Oklahoma. This case involves facts very similar to those involved here and would suggest that jurisdiction is lacking here as well.

The only factor which remains to be considered is that different state long arm statutes are involved. Decisions considering Wyo. Stat. § 5-4.2 are limited but do not indicate that the Wyoming provisions are broader than those of Illinois, Louisiana, Oklahoma or Alabama, where jurisdiction over out-of-state publishers has been denied. The Wyoming Supreme Court refused in Cozzens v. Piper Aircraft Corp., 514 P.2d 1375 (Wyo. 1973), to find jurisdiction over defendants who did several thousand dollars worth of business

in the state yearly and who, in one instance had an independent distributor in the state and sent salesmen into the state every two months to solicit business. In a case arising in this District, the Tenth Circuit affirmed and held that "If the legislature had intended to permit minimal contacts to expose one to jurisdiction under this section, they would not have used words like *regularly, persistent* and *substantial* in subsection (a)(iv)." See Pullen v. Hughes, 481 F.2d 602.

The alleged defamation was the result of acts done outside of the State of Wyoming so that Wyo. Stat. § 5-4.2(iii) fails to provide jurisdiction. The contacts of defendant Times Mirror with Wyoming were of such limited extent that it cannot be considered as regularly doing business in Wyoming so as to allow jurisdiction under Wyo. Stat. § 5-4.2(iv).

From the foregoing, I hold that the Wyoming Long-Arm Statute is insufficient in its elasticity to acquire jurisdiction over Times Mirror and that the contacts of Times Mirror in Wyoming were of such limited extent that it cannot be considered as regularly doing business in Wyoming.

United States Court of Appeals, for the Tenth Circuit.
JANUARY TERM—March 7, 1977

Before The Honorable Oliver Seth,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

Raymond B. Whitaker, Plaintiff-Appellant, vs. The Denver Post, Inc., a Colorado corporation; Cheyenne Newspapers, Inc., a Wyoming corporation; United Press International, a New York corporation; Associated Press, a New York corporation, Defendants, The Times Mirror Company, a California corporation, Defendant-Appellee. No. 75-1999, No. 76-1099, (D.C. No. C-75-127).

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court *in dismissing as to Los Angeles Times Mirror is reversed. The cause is remanded to the United States District Court for the District of Wyoming with directions to reinstate this claim.*

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

United States Court of Appeals, for the Tenth Circuit.

JANUARY TERM—March 7, 1977

Before The Honorable Oliver Seth, The Honorable James E. Barrett and The Honorable William E. Doyle, Circuit Judges

Donald Ray Anselmi, Plaintiff-Appellant, vs. The Denver Post, Inc., a Colorado corporation; Cheyenne Newspapers, Inc., a Wyoming corporation; United Press International, a New York corporation; Associated Press, a New York corporation, Defendants, The Times Mirror Company, a California corporation, Defendant-Appellee. No. 75-1998, (D.C. No. C-75-133).

This cause came on to be heard on the record on appeal from the United States District Court for the District of Wyoming, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court *in dismissing as to Los Angeles Times Mirror is reversed. The cause is remanded to the United States District Court for the District of Wyoming with directions to reinstate this claim.*

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

MARCH TERM—March 29, 1977

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, Circuit Judge, The Honorable Oliver Seth, Circuit Judge, The Honorable William J. Holloway, Jr., Circuit Judge, The Honorable Robert H. McWilliams, Circuit Judge, The Honorable James E. Barrett, Circuit Judge, and The Honorable William E. Doyle, Circuit Judge.

Donald Ray Anselmi, Appellant, vs. The Times Mirror Company, Appellee. No. 75-1998, (D.C. No. C75-133).

Raymond B. Whitaker, Appellant, vs. The Times Mirror Company, Appellee. No. 75-1999, No. 76-1099, (D.C. No. C75-127).

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, Barrett and Doyle to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

Affidavit of William F. Thomas.

United States District Court, District of Wyoming.

Raymond B. Whitaker, Plaintiff, vs. The Denver Post, Inc., et al., Defendants. Civil No. C75-127.

Filed: Sept. 15, 1975.

State of California, County of Los Angeles—ss.

WILLIAM F. THOMAS, being first duly sworn, deposes and says:

1. I am a citizen of the United States, over 21 years of age, and if called upon to do so, I could testify under oath to the matters stated herein.

2. I am the Executive Vice President and Editor of the Los Angeles Times, a division of The Times Mirror Company. I have held this position since October 30, 1972 and have held other newspaper management positions for in excess of ten years. My duties as editor of the Los Angeles Times include overall policy responsibility for the content of the newspaper and giving direction with respect to the nature or type of articles which should appear in the Los Angeles Times.

3. The Los Angeles Times is a metropolitan newspaper considered, I believe, to be one of the major disseminators of news in the United States. As such, it fulfills a unique function in assembling and presenting news to citizens in an increasingly urbanized and impersonal society.

4. The Los Angeles Times is distributed predominantly in the Los Angeles County-Orange County metropolitan area and elsewhere in the State of California. Accordingly, it attempts to provide full coverage of

California-originated news. However, it is further committed to the proposition that its readership, though for the most part resident in California, is vitally interested in news originating throughout the United States and the world.

5. In order to gather news to be disseminated to its readership, the Los Angeles Times maintains news bureau offices located not only in California, but also in Washington, D. C., Atlanta, Chicago, New York, Houston, Paris, Bonn, London, Rome, Moscow, Buenos Aires, Rio de Janeiro, Mexico City, Hong Kong, Cairo, Tokyo, New Delhi, Nairobi, Beirut and Jersualem. The news is obtained from reporters on the staff of the Los Angeles Times, independent writers and major news services.

6. The issue of the Los Angeles Times for Friday morning July 5, 1974 is relatively typical of weekday issues of the newspaper. It is composed of five parts totaling 86 pages of full size, non-tabloid news print.

A. Part I includes news not only of Los Angeles and California, but also coverage of events throughout the United States and the world. For example, this section of the July 5, 1974 Los Angeles Times included articles from Key Biscayne respecting the health of then President Nixon, from Beirut respecting Palestinian guerrillas, from Moscow respecting the space station, from Buenos Aires as to the Peron funeral, from Washington, D. C. noting the Justice Department investigation of the killing of Mrs. Martin Luther King, Sr., and from New York reporting the Special Prosecutor's probe of certain political gifts, as well as the Wyoming article originated by the Grand Jury investigation pending in Los Angeles. The second page of

this part contains separate sections collecting news articles applicable to The World, The Nation, The Southland (Southern California) and The State, as well as articles particularly relating to Energy and Environment and to Newsmakers.

B. Part II is oriented to events particularly related to Los Angeles County, as well as the newspaper's editorial section.

C. Part III includes both the Sports section and the Business and Finance section. (The Business and Finance portion of Part III was omitted from the July 5, 1974 paper because it immediately followed a business holiday.)

D. Part IV is entitled VIEW and includes matters of interest to the family as well as articles relating to entertainment and the arts.

E. Part V is the classified advertising section.

7. News is, to a considerable extent, engendered by controversy; and many news articles relate information concerning individuals involved in the news which they may consider to be unflattering, incorrect or both.

8. In my opinion, if the publisher of the Los Angeles Times were subjected to suits in areas of the United States and the world inconvenient to its California location because it fulfills its function of reporting national and international news as well as exclusively local features, the financial and time burdens thereby imposed would severely inhibit the ability of the newspaper to perform its function. The Los Angeles Times assumes responsibility for its contents, under the law, but it is not located in and convenient to the complete area of its news coverage and is subject to severe

financial harassment if it is made subject to suit in foreign forums simply because it publishes news respecting individuals who may reside in any location in the United States or the world. Necessarily, any such imposition of expense and loss would constrict the ability of the Los Angeles Times to provide to its readership the full news coverage necessary to an informed consideration of national and international events as well as the activities of the immediate community.

/s/ William F. Thomas
WILLIAM F. THOMAS

Subscribed and Sworn to before me this 19th day of August, 1975.

/s/ Fumiko Parent
Notary Public

[Seal]

LOS ANGELES TIMES.

July 5, 1974

BELIEVED CENTER OF WESTERN CRIME RING
U.S. Tries to Close Up 'Wide Open' Wyoming

ROCK SPRINGS, Wyo.—Talking is Mike Dansdill, 30-year-old thief and con artist who estimates he has stolen more than $1 million in valuables during his brief lifetime:

"Wyoming is a very naive state. Con man's got it made in this state. There's not a large population here. It's wide open."

Dansdill is glib, incorrigibly wayward and a braggart.

But federal investigators seeking to uproot a casually organized crime confederation operating throughout the West consider his appraisal of this state to be on the money.

As a result, they have focused on Wyoming as the suspected nerve center of the loosely knit ring—with particular emphasis on this wind-blown boomtown in the southwest corner of the state.

Investigators also think Dansdill's claim that the criminals have highly placed political connections in Wyoming is solid.

Two ranking Democrats in the state recently were summoned to testify before a U.S. grand jury in Los Angeles in connection with the investigation. A prominent Republican also is a subject of the inquiry.

Some participants in the investigation, The Times has learned, believe that the Wyoming end of it is moving much too sluggishly because of the political overtones.

Investigators look upon the criminal band as a loose mix of itinerant whores and pimps, sophisticated jewel and fur thieves, drug merchants and even killers-for-hire.

At the very least, the investigators are convinced that Wyoming—especially Rock Springs and other remote towns—is deteriorating into a sort of criminal R and R (rest and recreation) center, a sanctuary for a fraternity of bad actors.

The state, with a total population smaller than the city of Long Beach, clings to a primitive, frontier-style of law enforcement without any modern system of intelligence or coordination.

One sprawling cattle ranch has been turned into a rustic gun club and hunting spa for known figures in organized crime who frequently fly in to escape the "heat" and pressure.

"These guys," said one federal agent, "work their specialty in places like Los Angeles, Denver, Lake Tahoe or Las Vegas—stickups, burglaries or whatever—then run back to Wyoming to cool it when things get too hot.

"People there mind their own business, so nobody asks too many questions, and the guy's got it made. Nobody's likely to call a cop, because that's not the way to do things."

Particularly in Rock Springs—where Butch Cassidy earned his nickname but which seems an improbable focal point for a complex criminal investigation.

Yet the number of federal and state investigators presently concentrating on the community rivals the posses that chased Cassidy and his Hole in the Wall

gang through the same crooked streets and arid sagebrush nearly a century ago.

One reason it attracts the lawless is simple enough:

The town, which sprawls along Interstate 80 on a high desert plain, has grown in the last four years from a quiet settlement of 12,000 into a clutter of aged houses, ramshackle tent camps and mobile home parks with a population of 26,000.

The swift growth—which brought 3,300 new residents here in one month—began in 1971 with the completion of a new $500 million steam-electric project.

Almost immediately afterward, several giant chemical firms opened or expanded vast trona mines northwest of the city and added hundreds of new employes.

More workers arrived with a surge in oil drilling in the area and still others came to work reopened coal and uranium mines or to labor at a 17,000-acre strip mine that fuels the steam-electric project.

As a result of the boom, Rock Springs has come to resemble the lusty frontier town it once was—with more prostitutes than policemen, open gambling, hostility on the part of many toward law enforcement and a narcotics problem.

Prostitutes who ply their trade in shoddy bars along the town's skid row tell it like it really is here today.

"Hell, honey, this town is wall-to-wall whores," said a chunky young woman during a conversation overhead [*sic*] by two Times reporters. "And dope, why it's all over the place."

Lisa, 20, a slender, unkempt blonde from Inglewood, Calif., who moved here after working briefly in Salt Lake City, said:

"All the girls in Salt Lake said Rock Springs was the place to come, so I just packed up one day and moved. They told me there was big money here and no heat (police problem), and now I'm making about $1,000 every week and only working six days."

Lisa's roommate, Jackie, attractive and much in demand, drives a $9,000 foreign sedan.

Lisa and Jackie are freelancers, but most of the prostitutes here are part of a "string"—meaning they share their earnings with pimps, several of whom reportedly are from Los Angeles and Orange counties.

Many of the women must pay an additional $6 per customer to the owner of an after-hours club for use of his bar as a meeting place.

But in the hours before closing time, they openly work such establishments as the OK Bar and Lounge, Jake's Club and the Townsend Club.

Meanwhile, colorfully dressed pimps in platform shoes parade Pilot Butte and K Sts. or hold animated conversations in luxury automobiles.

So blatant are prostitution and gambling here that the local newspaper reported a criminal justice class in the town's Western Wyoming College sought to compute the amount of money each generated.

As far as gambling goes, the class arrived only at a conclusion that profits from it were enormous.

But the class decided, according to "The Rocket Miner," that a single prostitute working 25 days a month could earn $90,000 annually.

Based on those figures—and the minimum estimate of 40 girls working Rock Springs—prostitution produces

$300,000 a month or almost $3.6 million a year. And, observed the class instructor, it's all tax free.

"The biggest single expense in most cases," added the instructor—himself a former federal agent—"is the payoff in protection money."

Residents of Rock Springs talk openly to visitors here about high stakes card games in a variety of establishments here.

Police or sheriff's deputies make occasional raids but they halt the operations only briefly.

Last year, because of the aggravated situation, FBI agents acted. They arrested 11 persons in connection with gaming in one tavern and charged them with interstate gambling violations. But a judge threw out the case on a technicality.

The favorite card game remains an Italian import of more than a century ago. Oldtimers call it "barbootz."

One Wyoming police chief said the amount of illegal narcotics flowing into the state, especially into the Rock Springs area, is "beyond calculating."

"We've got a hell of a drug problem here," he added.

In his opinion, the chief said, Salt Lake City and Denver are major supply points and the importers are "tied in with organized crime."

The downtown section of Rock Springs—where prostitutes vie for patrons and the gambling flourishes—is a shabby collection of century-old buildings, rundown shops and crackerbox houses with peeling paint and broken windows.

It is cut off from sightlier neighborhoods by the main line of the Union Pacific Railroad, which knifes through the business district.

It is here Butch Cassidy and the Wild Bunch sought diversion when they emerged from their Diamond Mountain hideout. Cassidy earned his nickname, long before teaming with the Sundance Kid, by working in a butcher shop on one of these mean streets.

Many outlaws who passed this way still are considered folk heroes.

But there is nothing romantic about current reports of criminal activity, aside from prostitution and gambling, that have come investigators' way.

For instance, an informant outlined an illegal drug and stolen car racket headquartered in Rock Springs that he said worked this way:

Narcotics—heroin or hashish—was hidden behind door panels of stolen cars that were driven to Denver or Salt Lake City, where the drugs were retrieved and the cars stripped or sold intact.

Investigators have received reports of at least a dozen suspicious deaths in the area.

Victims, according to the report, ranged from a prospective court witness who vanished in an abandoned mine shaft to a state police officer killed in an odd one-car traffic accident and his wife, who allegedly committed suicide.

Then there is the story about two Las Vegas thughs [*sic*] who reportedly arrived here in late 1970 to

collect on an $8,000 check written by a local businessman to cover gambling debts on which payment was stopped. An investigator said the two later were found dead in their car, both shot in the head.

What emerges as investigators dig deeper into lawlessness in Rock Springs is a classic example of a community unwilling or unable to cope with criminal elements entrenching themselves here.

This, combined with what investigators have discovered elsewhere in Wyoming, has given impetus to the inquiry now being ramrodded largely by the Los Angeles-based Organized Crime Strike Force.

Most subjects of the investigation are aware they are under scrutiny.

They have sought to discredit the inquiry by claiming Dansdill, a primary source of investigators' information, is "a psychopathic liar" and "mentally unbalanced."

However, The Times learned, Dansdill has been subjected to intensive polygraph examination on various aspects of his statement and, the results indicated he was not lying.

Additionally, investigators independently have corroborated many of his allegations. These include details about previously unsolved—even unreported—crimes in which he claims to have participated with some targets of the investigation.

The two political figures who appeared before the Los Angeles grand jury—along with four other men—both are heavyweights in Wyoming Democratic circles. They are:

—Don Anselmi of Rock Springs, state Democratic Party chairman and Democratic national committeeman from Wyoming.

—Raymond Whitaker, a Casper lawyer, former state party chairman, 1966 nominee for U.S. senator, former county (Natrona) prosecutor and counsel to the Democratic National Platform Committee in 1956.

Under investigation by both the strike force and the U.S. attorney for Wyoming is John Ackerman—another Casper lawyer, member of an influential Republican family and Natrona County public defender.

The immediate matters involving the three who are being investigated include:

—Anselmi, Whitaker and the other four men were asked by the grand jury if they had bought guns in Wyoming they knew to have been stolen in California.

Dansdill claims he and a confederate took the guns from a Riverside County residence on July 1, 1971, then drove 22 straight hours to Whitaker's mountain cabin near Casper. There, he says, Anselmi and Whitaker, among others, bought the weapons.

Hackerman is under investigation because of Dansdill's claim that the lawyers hid him when Dansdill was sought for a year and a half on a federal warrant charging him with an earlier gun theft. Dansdill eventually turned himself in and was sent to state prison. A number of witnesses, The Times learned, have confirmed Dansdill's story.

Even if provable, these scarcely seem high crimes. But members of the strike force are attempting to determine if the three politicians are involved in more serious matters.

During their grand jury testimony, Anselmi, Whitaker and the other four men reportedly denied buying the guns or even being at the mountain cabin when Dansdill said they purchased the weapons.

Anselmi took a polygraph examination regarding the matter. He refused to talk to a Times reporter about it or even to concede he had appeared before the grand jury.

Whitaker, however, insists that Anselmi passed the test.

"Except for one question," Whitaker said. "Those tests are highly subjective, as you know. He was asked if he knew anything about the matter under investigation. Of course, he knew something—what they had told him."

The Times reporter sought to interview Anselmi in a spacious, smartly appointed Rock Springs motel of which he is half owner.

The Outlaw Inn, as it is called, is merely one of many Anselmi family holdings, not only in booming Rock Springs but elsewhere in the state. It houses a restaurant named Robbers' Roost, which is decorated with paintings and old photographs of Western badmen, such as Butch Cassidy.

In Rock Springs itself, Anselmi or his brothers own rental properties, an automobile sales firm, a mobile home business and a car rental franchise.

The brothers are Paul, who also was a witness before the Los Angeles grand jury, and John, a lawyer.

The Times reporter suggested Don Anselmi, as a public official, might have a responsibility to respond to certain questions, particularly about his reputed associates. But he replied hostilely:

"I'm not a public official. Republicans are the only people who get elected in Wyoming. (The state's senior U.S. senator, Gale W. McGee, is a Democrat. So is its lone U.S. representative.)

"I'm just a party official. My private life is my own business. I'm not going to talk about my associations."

Whitaker, on the other hand, was the image of affability during the newsman's visit to his Casper office. A picture of him campaigning with John F. Kennedy hangs on a wall.

He freely admitted his grand jury appearance. He also unhesitatingly acknowledged knowing Dansdill and a notorious criminal known to police throughout the West—Robert Marshall, once a football star at the University of Wyoming.

Marshall currently is serving 20 years in federal prison, having just recently been assigned by a U.S. judge in Las Vegas to a new category of criminal: dangerous special offender.

Previously he had been convicted, first, of peddling stolen U.S. savings bonds, then, of trafficking in explosives as a result of an investigation by the U. S. Bureau of Alcohol, Tax and Firearms. He also is suspected of at least one murder and has been a companion of organized crime figures. Marshall currently is being quizzed about his Wyoming connections by investigators.

Dansdill claims Marshall was his partner in the Riverside County gun theft and participated in the sale of the weapons to Anselmi, Whitaker and others in Wyoming.

Not so, said Whitaker. He insisted each of the men named by Dansdill as purchasers can prove he was elsewhere at the time Dansdill said the sale took place.

Whitaker said he has begun his own "counter-investigation" into what he claims is a federal "head-hunt" that is politically inspired. The investigation, he claimed, is evidence that "Watergate actually was implemented—and implemented through this strike force bunch."

Richard P. Crane, the attorney who heads the strike force in Los Angeles, characterized Whitaker's assertion as "utter nonsense."

Of his relationship with Dansdill, Whitaker said, "Mike was a likable rogue. In my business, I know Dansdills and Marshalls by the dozens."

He said he once had employed Dansdill briefly because: "I have this mountain property, and, for insurance reasons I need a caretaker up there." It was only after Dansdill quit that he learned Dansdill was a burglar, Whitaker said.

Regarding Marshall, Whitaker said he twice had represented him in criminal cases. He also volunteered that, although he knew Marshall to be a "bad guy," he once lent him $5,000 to buy into a Casper vending machine company.

"To my knowledge, here in town, he never did anything criminal," Whitaker said.

"When I loaned him the $5,000 I knew of his criminal past. But I thought, here's a guy maybe I can help some. I was a prosecutor here and maybe feel a little twinge of conscience."

Whitaker admits he made telephone calls to highly placed officials in Wyoming—both state and federal—

after learning of the investigation. He also called Crane in Los Angeles. Crane would not comment.

Ackerman, like Anselmi, declined to answer a Times reporter's questions. The public defender invited the newsman to sit down in his Casper office but said, "I'm just going to sit here and say 'No, no,' to everything you ask."

Whitaker said he had agreed to a request by investigators that he take a polygraph test but had to postpone it and the request never was renewed.

Ackerman, The Times learned, also agreed to submit to such a test—if Dansdill, whom Ackerman on occasion has represented in court, would waive lawyer-client privilege. Dansdill long since has signed the waiver, but no examination has been given.

This—and U.S. Attorney Richard Thomas' apparent indecision about the case—have led to accusations by some investigators that Thomas is dragging his feet for political reasons.

This concern, The Times learned, has been communicated to the Justice Department in Washington.

The Times also learned that weeks ago Thomas prepared both a complaint against Ackerman and a warrant for his arrest. Just before they were to be filed, however, Thomas withdrew them.

Thomas denies these were the true circumstances. "There is no warrant," he told a Times reporter during an interview in his Cheyenne office.

What about the complaint, he was asked later.

"In terms of what I think of as pleadings," he replied, "no such complaint was filed. No. Our position is that it was not prepared for the purpose of filing. I think of it in terms of a draft. We're still in the

FILED
JUN 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1524, Misc.

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Petitioner,

vs.

DONALD RAY ANSELMI,

Respondent.

THE TIMES MIRROR COMPANY,

Petitioner,

vs.

RAYMOND B. WHITAKER,

Respondent.

Brief of Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Statement of the Case

Respondents clarify misleading portions of the Statement of the Case contained in the Petition for Writ of Certiorari. Petitioner The Times Mirror Company (hereinafter Times Mirror) has stated in the Petition that the District Court dismissed the action against Times Mirror on the ground, *inter alia*, that "applicable provisions of the First and Fifth Amendments to the United States Constitution, operative through the Fourteenth Amendment,

prevented the exercise of Wyoming jurisdiction under the facts of the case." (Brief of Petitioner, Page 6) In fact, however, the opinion of the District Court does not even mention the Fifth and Fourteenth Amendments, and only refers to the First Amendment when quoting from another case. (Brief of Petitioner, Pages A-26 and 27)[1] Even on that point, however, Judge Kerr made that reference in his discussion of the "regularly doing business" portion to the long-arm statute, and that section of his opinion was not the basis of the Tenth Circuit's reversal. His opinion, then, solely concerned itself with whether the facts that were presented fit the applicable Wyoming statutes.

Simply stated, the decision of District Court Judge Kerr was twofold: *first*, § 5-4.2(iii), W.S. 1957, (tortious injury resulting from an act in Wyoming) failed to confer jurisdiction because the single publication rule meant that the "act" in question was the single act of printing the newspaper in California; *second*, § 5-4.2(iv), W.S. 1957, (doing business in Wyoming) failed to confer jurisdiction because the involvement of Times Mirror within the state did not meet the standards of regularly doing business.

On appeal to the United States Court of Appeals for the Tenth Circuit, the Court affirmed Judge Kerr's decision under subsection (iv) of the long-arm statute, stating "for this is not a 'doing business' set of facts." (Petitioner's Brief, Page A-7) However, the Circuit Court reversed the District Court on jurisdiction under subsection (iii), holding that "the Los Angeles Times released a force which took effect in Wyoming and which with the other jurisdictional facts satisfies the minimum contact requirement". (Petitioner's Brief, Page A-22) In other words the Tenth Circuit ruled that the tortious activity occurred in Wyoming, causing injury in Wyoming, and that this was sufficient to place jurisdiction of this case in the District Court of Wyoming.

[1]Because the opinions by the District Court and by the Tenth Circuit have been printed in Petitioner's Brief, Respondents will cite to the opinions by referring to the appropriate page of Petitioner's Brief.

Reasons for Denying the Writ

This Court should not grant a writ of certiorari in this case for the following reasons:

1. The decision by the Tenth Circuit rests upon an interpretation of state law.
2. The decision by the Tenth Circuit does not raise the conflict among circuit courts claimed by Petitioner.
3. Granting certiorari would significantly delay this case.

I

The Decision by the Tenth Circuit Court of Appeals Concerned Interpretation of Two Areas of Wyoming Law: Whether the Actions of Times Mirror Constituted a Tortious Injury in Wyoming, and Whether Wyoming Has Adopted the Single Publication Rule. In So Doing the Court of Appeals Did Not Reach or Decide Any Question of Federal Law.

Petitioner Times Mirror argued to the circuit court that the Wyoming Long-Arm Statute did not confer jurisdiction over it by the United States District Court for the District of Wyoming. Although the entire long-arm statute is reproduced below,[2] the relevant portion of that statute, § 5-4.2(iii), W.S. 1957 as amended, provides for the exercise of personal jurisdiction over any person "causing tortious injury by an act or omission in this state". It was that section of the statute that was the subject of the decision below.

In deciding that personal jurisdiction was conferred, the court treated two areas of Wyoming law. First, the court held that subsection (iii) of the long-arm statute was applicable and controlling. (Petitioner's Brief, Page A-21) By sending the

[2]§ 5-4.2
(a) In addition to all other bases of jurisdiction otherwise authorized or provided by law, any court of this state may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's
(i) transacting any business in this state;
(ii) contracting to supply services or things in this state;
(iii) causing tortious injury by an act or omission in this state;
(iv) causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct in this state or derives substantial revenue from goods consumed or services used in this state;
(v) having an interest in, using, or possessing real property in this state; or
(vi) contracting to insure any person, property, or risk located within this state at the time of contracting.
(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.

defamatory statement into Wyoming, thereby causing injury to a Wyoming resident, the court reasoned that Times Mirror could be held to have caused tortious injury by an act in Wyoming. (Petitioner's Brief, Page A-7 and 21) Deciding this point of law rested solely on an interpretation of the applicability of the Wyoming statute to the facts of the case.

The second area of Wyoming law treated by the circuit court was the single publication rule. Earlier, Judge Kerr had reasoned in his district court opinion that the single publication rule had been adopted in Wyoming. (Petitioner's Brief, Page A-26) The circuit court reviewed state decisions and determined that it had not been adopted in Wyoming. (Petitioner's Brief, Page A-21) Moreover, the court held that the effects of the single publication rule were much more limited than those ascribed to the rule by Judge Kerr.[3] Here again, however, the circuit court was dealing with intrepretations of state law.

The petition should be denied, therefore, because the decision below is based upon the Tenth Circuit's interpretation of Wyoming law. There is no show-

[3]Judge Kerr interpreted the single publication rule to mean that the tort was complete in the state of printing, i.e. California, (Petitioner's Brief, Page A-26) Because subsection (iii) of the long-arm statute confers jurisdiction over a person "causing tortious injury by an action . . . in this state", he reasoned that the subsection was inapplicable "since the 'act' was committed in California, not in Wyoming . . ." (Id.) Disagreeing with his broad interpretation of the rule, the circuit court held that the rule was designed to prevent multiple suits, and had no bearing on the issue of personal jurisdiction. (Petitioner's Brief, Page A-21)

ing under Rule 19 by Times Mirror that the Tenth Circuit's interpretation is "in conflict with applicable state or territorial law", nor is there a showing that the court below "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."[4]

II

The Decision by the Tenth Circuit Is Not In Conflict with Decisions in Other Circuit Courts as Claimed by Times Mirror. Not only is the Position of the Fifth Circuit Unclear at This Time, But, More Importantly, the Language Relied Upon by Times Mirror in the Tenth Circuit Decision is Dictum and In No Way Forms the Basis for Decision by that Court.

Petitioner Times Mirror claims that a clear conflict exists in the rules of decision announced by the Tenth Circuit in this case, and rules previously announced in the Fifth Circuit and, perhaps, in the Second Circuit. Upon examination, however, it can be shown that the conflict claimed by Times Mirror does not exist.

This Court has held that an exercise of personal jurisdiction must not violate rights of due process as guaranteed by the Fifth and Fourteenth Amendments. The constitutional test is met if the defendant has such "minimum contact with [the forum] such that the maintenance of the suit does not of-

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[4]Rule 19, Rules of the Supreme Court of the United States.

fend 'traditional notions of fair play and substantial justice'." (*International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958)) In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957) this Court found that the requisite "minimum contacts" were met when a Texas insurance company solicited one insurance policy in California, and serviced that policy by sending notices and collecting premiums.

In testing the minimum contacts of defendant publishers in libel cases, the Fifth Circuit has stated that the First Amendment requires a greater showing of contacts than would be required in tort cases that do not raise First Amendment issues (*New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966)):

> First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity.

After that decision in 1966, however, the position of the Fifth Circuit has become less clear. One year after *Connor* the Fifth Circuit was presented with a libel case involving a magazine publisher rather than a newspaper publisher as in *Connor*. (*Curtis Publishing Company v. Golino*, 383 F.2d 586 (5th Cir. 1967)) In that case the Fifth Circuit retreated and held that national magazine publishers were more susceptible to personal jurisdiction than were national newspaper publishers. (*Curtis Publishing Company v. Golino*, supra at 590) Moreover, the

court in *Curtis Publishing* characterized the *Connor* test to be merely a relevant "factor" to be considered in the determination of due process:

> Rather, *Connor* indicates that first amendment considerations are a factor relevant to a determination of the jurisdictional question; and, the discussion of that factor in *Connor* must be viewed in its factual context.
>
> *Curtis Publishing Company v. Golino*, supra at 592

Since *Curtis Publishing* the Fifth Circuit dealt twice more with jurisdiction in libel cases, and both cases further confuse the statement in *Connor*. In 1971 the court decided the case of *Wolfson v. Houston Post Company*, 441 F.2d 735 (5th Cir. 1971), and in a *per curiam* decision the court cited *Connor* but did not mention First Amendment considerations at all. Then, in 1975 the court was presented its most recent libel case which involved the assertion of jurisdiction in Mississippi over the Associated Press based upon the publication on a news story that came over the AP wires in Mississippi. (*Edwards v. Associated Press*, 512 F.2d 258 (5th Cir. 1975)) In holding that Mississippi could assert jurisdiction under its long-arm statute, the court referred to its statement in *Connor*, and accorded that statement a status less fixed and clear than is claimed now by Petitioner Times Mirror. Whereas Times Mirror asserts that the statement in *Connor* is a "rule of decision" (Petitioner's Brief, Page 22) and a "holding" (Petitioner's Brief, Page 21), the

Fifth Circuit pointedly and explicitly stated otherwise:

> Appellee here insists that the "rule" of *Connor* requires the quashing of the service obtained on it. . . .*Connor* indicates not so much a rule as it expresses a cautionary note. When a court attempts to assess whether jurisdiction over a defendant is reasonable, First Amendment considerations are a significant factor to be weighed.
>
> —*Edwards v. Associated Press*, supra at 266

Times Mirror, thus, gives greater significance and stature to the *Connor* statement than does the Fifth Circuit. That court, as indicated above, characterizes *Connor* as expressing a "cautionary note" rather than formulating a "rule".

As to the Second Circuit, Times Mirror can only say that "perhaps" (Petitioner's Brief, Page 21) that Circuit is in accord with the Fifth Circuit, and that the position in that circuit is "unclear". (Petitioner's Brief, Page 23) The decision in question is *Buckley v. New York Post Corporation*, 373 F.2d 175 (2d Cir. 1967), and, if anything, that decision is mildly critical of the *Connor* decision (*Buckley v. New York Post Corporation*, supra at 182-184)

It is Respondents' position, therefore, that neither the Fifth nor the Second Circuit presents the clear rules of law ascribed to them by Times Mirror. But, even assuming that both of those circuits presented crystal clear and unambiguous rules on the First Amendment issue, it could not be said that the

opinion by the Tenth Circuit in this case presents a contrary holding.

In his opinion in this case Judge Doyle in *dictum* states:

> Later Fifth Circuit cases such as *Curtis Publishing Company v. Golino*, 383 F.2d 586, 588, 589 (5th Cir. 1967), suggest that the Fifth Circuit is not at this time adhering to the early rule calling for weighing heavily the fact that the case is a First Amendment one in deciding whether the contacts are adequate. To hold as did the Fifth Circuit that the First Amendment has to be thrown on the scales as an added impediment in media cases gives to the media an additional arrow which is not appropriate in a determination as to whether the contacts are legally sufficient to constitute due process.
>
> —Petitioner's Brief, Page A-19

But, immediately thereafter, the opinion states that if that factor *would be* weighed, the jurisdictional decision would be the same:

> But even if this element were to be placed on the scales, so to speak, at this time, there is a countervailing policy consideration that outweighs it. We refer to the extremely disadvantageous position that citizens of Wyoming would be placed in if we were to adopt the *Insull* approach. No matter what the extent of the defamation was by an out-of-state member of the media to a citizen of Wyoming, the latter would be remedyless within Wyoming and

> would be forced, as we have seen, to travel to the home of the newspaper in order to vindicate his reputation.
>
> —Petitioner's Brief, Pages A-19-20

The circuit court in this case clearly took into account the First Amendment contention of Petitioner and still ruled that the required minimum contacts were present. (Petitioner's Brief, Pages A-15, 18, 19 and 20) No decision was rendered that is in conflict with other circuit courts. If anything this decision simply placed on the scales an additional consideration, that is the position of the victims. Petitioner would have this court believe the Tenth Circuit refused to place on the scales that element which the circuit court ruled was clearly outweighed. How can they be outweighed if they were not even on the scales?

Accordingly, a review of the decisions in the Fifth, Second, and Tenth Circuits does not reveal a conflict in the applicable rules of decision in those circuits as claimed by Times Mirror. As for the Fifth Circuit, not only is the position of that Circuit unclear as a result of the decisions after *Connor*, but also the Court has itself pointed out that the *Connor* statement "indicates not so much a rule as it expresses a cautionary note". (*Edwards v. Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975)) As for the Second Circuit, it has taken a position that by the admission of Times Mirror is "unclear". As for the Tenth Circuit, the decision in this case only contains *dictum* that discusses *Connor;* it does not establish a holding, nor does it rest any part of its

decision on a point at variance with *Connor*. Postulating a conflict among the circuits in this context is an act arising from imagination and fantasy, rather than an act arising from fact.

III

If this Court Grants the Writ of Certiorari, the Case Will Be Prejudicially Delayed.

The newspaper story that gives rise to this litigation was printed July 5, 1974. Respondent Whitaker filed his case June 10, 1975 and Respondent Anselmi followed on June 20, 1975. As of this date Times Mirror has still not filed an answer to either complaint. All discovery has been stayed. For almost two full years Times Mirror has held the litigation to a virtual standstill with its jurisdictional contentions. If this court grants certiorari, the proceedings will be stayed throughout that period, and discovery and further preparation of the case will be precluded. The practical effect of granting certiorari would be to delay the trial of the case for several more years. The discretion of this Court should be exercised to deny the writ, and allow the case to progress through trial. Not only will the rights of Times Mirror be preserved, but this case can progress at a rate to avoid further prejudice to Respondents' rights. (*Denver v. New York Trust Co.*, 229 U.S. 123 (1913); *Ohio Ex Rel Seney v. Swift & Company*, 260 U.S. 146 (1922))

Conclusion

The petition for writ of certiorari should be denied. The decision by the Tenth Circuit is simply an interpretation of Wyoming state law and does not present a ruling in conflict with the rule of law announced in any other circuit. The case should be allowed, at long last, to proceed to its merits.

Dated: May 27, 1977.

Respectfully submitted,

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